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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 TIGER BAY VILLAGE CORP.,) CV 15-06377-RSWL-FFMx
13)
14 Plaintiff,) **ORDER** re: Defendant's
15 v.) Motion to Dismiss for
16) Failure to State a Claim
17 SHAUQIANG CHEN aka STEVEN) pursuant to F.R.C.P.
18 CHEN, and DOES 1 to 10,) 12(b)(6) [15] and
19 Defendants.) Plaintiff's Motion for
Leave to File Amended
Complaint [26]
)

20 Presently before the Court are two motions: (1)
21 Defendant Steven Chen's ("Defendant") Motion to Dismiss
22 for Failure to State a Claim Pursuant to Fed. R. Civ.
23 P. 12(b)(6) [15] ("Motion to Dismiss"), and (2)
24 Plaintiff Tiger Bay Village Corporation's ("Plaintiff")
25 Motion for Leave to File Amended Complaint [26]
26 ("Motion to Amend Complaint").

27 Having reviewed all papers submitted pertaining to
28 these Motions, the Court **NOW FINDS AND RULES AS**

FOLLOWS: the Court **DENIES** Plaintiff's Motion to Amend Complaint [26], and **GRANTS** Defendant's Motion to Dismiss [15] **WITH TWENTY DAYS LEAVE TO AMEND.**

I. BACKGROUND

A. Factual Background

Plaintiff Tiger Bay Village Corporation ("Plaintiff") is a Canadian corporation with its principal place of business in Vancouver, Canada. Compl. ¶ 1, ECF No. 1. Defendant Shauqiang (Steven) Chen ("Defendant") is an individual residing in Los Angeles, California. Id. at ¶ 2.

Qingdao Hairong Foodstuff ("QHF") is a Chinese company in the business of selling and exporting frozen seafood products. Id. at ¶ 7. Yihe Corporation ("Yihe") is a California corporation which purchased seafood products from QHF. Id. Plaintiff alleges that Defendant owns both QHF and Yihe. Id. at ¶ 8.

As a result of QHF's delivery of products to Yihe, Yihe is indebted to QHF in an amount of at least \$12,000,000 (the "Yihe Debt"). Id. at ¶ 9.

On or about June 13, 2013, QHF and an individual named Hai Rong Wang ("Wang") entered into a loan agreement whereby Wang loaned to QHF \$4,000,000, plus interest (the "QHF Loan"). Id. at ¶ 10.

As additional security for the QHF Loan, Defendant executed a personal guaranty promising to repay the QHF Loan in the event that QHF defaulted (the "Personal Guaranty"). Id. QHF also assigned to Wang all of

1 QHF's rights and interests in the Yihe Debt up to an
2 amount of \$4,000,000 plus accrued interest (the "Wang
3 Assignment").¹ Id. at ¶ 11.

4 On November 15, 2013, Wang assigned to Plaintiff
5 all of Wang's rights and interests in the Wang
6 Assignment, QHF Loan, and Personal Guaranty (the "Tiger
7 Bay Assignment"). Id. at ¶ 12. Plaintiff alleges that
8 Wang assigned to Plaintiff the right to enforce the
9 terms of the Personal Guaranty and Wang Assignment, and
10 to collect on the QHF Loan. Id.

11 Plaintiff alleges that QHF defaulted on the QHF
12 Loan, Defendant defaulted on the Personal Guaranty, and
13 Yihe defaulted on its obligations to repay the Yihe
14 Debt to QHF. Id. at ¶ 15.

15 On November 27, 2013, Plaintiff filed an action in
16 this Court against Yihe and Defendant, Case Number CV
17 13-8837-RSWL-FFM (the "2013 Action"), to enforce the
18 terms of the Tiger Bay Assignment. Id.

19 Plaintiff and Yihe settled the 2013 Action (the
20 "Settlement"). Id. at ¶ 16. As part of the
21 Settlement, Yihe was required to make monthly payments
22 to Plaintiff. Id. Defendant was dismissed from the
23 2013 Action without prejudice, and Plaintiff's claims
24 against Defendant were not released, subject to Yihe's
25 performance under the Settlement. Id.

26
27 ¹ The parties refer to this assignment as the "QHF
28 Assignment," however, the Court refers to the assignment as the
"Wang Assignment" for clarity.

1 After making a few payments, Yihe defaulted on its
2 payment obligations under the Settlement. Id. at ¶ 17.
3 On July 22, 2014, Plaintiff obtained a judgment against
4 Yihe for \$3,695,135 (the "Judgment"). Id. On December
5 8, 2014, Plaintiff obtained a Writ of Execution on the
6 Judgment. Id. Plaintiff alleges that Yihe continues
7 to fail to pay on the Judgment. Id.

8 On January 27, 2015, Plaintiff examined Defendant
9 as part of its efforts to enforce the Judgment. Id. at
10 ¶ 18. During Defendant's examination, Defendant
11 testified that Yihe was insolvent when Defendant caused
12 Yihe to pay him approximately \$480,000 for the years
13 2013 and 2014. Id. Plaintiff alleges that Defendant
14 caused Yihe to make other payments and transfer funds
15 to him to the detriment of Yihe's creditors, including
16 Plaintiff. Id. Plaintiff alleges that the payments
17 were not made for reasonably equivalent value, but were
18 designed to improperly divert Yihe's money away from
19 its creditors. Id.

20 **B. Procedural Background**

21 On August 20, 2015, Plaintiff filed its Complaint
22 [1] against Defendant for (1) breach of contract, (2)
23 promissory fraud, (3) avoidance of fraudulent
24 conveyance pursuant to California Civil Code § 3439.05,
25 and (4) accounting pursuant to California Civil Code §
26 3439.07(a)(1).

27 The parties stipulated to extend the time to answer
28 the Complaint, and Defendant filed a Motion to Dismiss

1 [15] on November 12, 2015. In an attempt to settle
2 this action, the parties continued the hearing on
3 Defendant's Motion to Dismiss [19]. The hearing was
4 continued to March 22, 2016, with Plaintiff's
5 Opposition due on March 1, 2016 and Defendant's Reply
6 due on March 8, 2016.

7 On March 1, 2016, instead of opposing Defendant's
8 Motion to Dismiss, Plaintiff filed a Motion to Amend
9 Complaint [26] and a Proposed First Amended Complaint
10 ("Proposed FAC") [26-1].

11 On March 8, 2016, Defendant filed a Notice of Non-
12 Opposition to the Motion to Dismiss [31] and an
13 Opposition to Plaintiff's Motion to Amend Complaint
14 [32]. Plaintiff filed a Reply [33] to Defendant's
15 Opposition on March 15, 2016, and the Court
16 consolidated the hearings on Defendant's Motion to
17 Dismiss [15] and Plaintiff's Motion to Amend Complaint
18 [26] to March 29, 2016 [38]. On March 24, 2016, both
19 Motions were taken under submission [39].

20 II. DISCUSSION

21 A. Legal Standard

22 1. Federal Rule of Civil Procedure 15(a)

23 Federal Rule of Civil Procedure 15(a) provides that
24 a party may amend its pleading once as a matter of
25 course within 21 days after service of a responsive
26 pleading or 21 days after service of a motion under
27 Rule 12(b), (e), or (f), whichever is earlier. Fed. R.
28 Civ. P. 15(a)(1). "[T]he right to amend once as a

1 matter of course terminates 21 days after service of a
2 motion under Rule 12(b), (e), or (f)." Fed. R. Civ. P.
3 15 Advisory Committee Notes, 2009 Amendment.

4 After the time to amend as a matter of course has
5 expired, "a party may amend its pleading only with the
6 opposing party's written consent or the court's leave."
7 Fed. R. Civ. P. 15(a)(2). Generally, Rule 15 advises
8 that "leave shall be freely given when justice so
9 requires." Id. Absent undue delay, bad faith or
10 dilatory motive on the part of the movant, repeated
11 failure to cure deficiencies by amendments previously
12 allowed, undue prejudice to the party opposing the
13 amendment, or futility of amendment (the "Foman
14 factors"), the Court should grant leave to amend.
15 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048,
16 1052 (9th Cir. 2003) (citing Foman v. Davis, 371 U.S.
17 178, 182 (1962)).

18 Futility of proposed amendments is evaluated under
19 the Federal Rule of Civil Procedure 12(b)(6) standard.
20 ABM Indus., Inc. v. Zurich Am. Ins. Co., 237 F.R.D.
21 225, 227 (N.D. Cal. 2006) (citing Miller v. Rykoff-
22 Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988));
23 Nordyke v. King, 644 F.3d 776, 788 n. 12 (9th Cir.
24 2011) ("[T]he 'proper test to be applied when
25 determining the legal sufficiency of a proposed
26 amendment is identical to the one used when considering
27 the sufficiency of a pleading challenged under Rule
28 12(b)(6).' " (citation omitted)).

1 2. Federal Rule of Civil Procedure 12(b)(6)

2 Federal Rule of Civil Procedure 12(b)(6) allows a
3 party to move for dismissal of one or more claims if
4 the pleading fails to state a claim upon which relief
5 can be granted. Fed. R. Civ. P. 12(b)(6). A complaint
6 must "contain sufficient factual matter, accepted as
7 true, to state a claim to relief that is plausible on
8 its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
9 (internal quotation marks omitted). Dismissal can be
10 based on a "lack of a cognizable legal theory or the
11 absence of sufficient facts alleged under a cognizable
12 legal theory." Balistreri v. Pacifica Police Dep't,
13 901 F.2d 696, 699 (9th Cir. 1990).

14 In ruling on a 12(b)(6) motion, a court must
15 presume all factual allegations of the complaint to be
16 true and draw all reasonable inferences in favor of the
17 non-moving party. Klarfeld v. United States, 944 F.2d
18 583, 585 (9th Cir. 1991). The question presented by a
19 motion to dismiss is not whether the plaintiff will
20 ultimately prevail, but whether the plaintiff has
21 alleged sufficient factual grounds to support a
22 plausible claim to relief, thereby entitling the
23 plaintiff to offer evidence in support of its claim.
24 Iqbal, 556 U.S. at 678; Swierkiewicz v. Sorema N.A.,
25 534 U.S. 506, 511 (2002). While a complaint need not
26 contain detailed factual allegations, a plaintiff must
27 provide more than "labels and conclusions" or "a
28 formulaic recitation of a cause of action's elements."

1 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)
2 (internal citation omitted).

3 **B. Discussion**

4 1. The Court grants Defendant's Motion to Dismiss.
5 Pursuant to Local Rule 7-12, "[t]he failure to file
6 any required document . . . may be deemed consent to
7 the granting or denial of [a] motion [to dismiss]."
8 See L.R. 7-12. The Court deems Plaintiff's failure to
9 oppose Defendant's Motion to Dismiss as consent to the
10 granting of the Motion. Id.; see also Grodzitsky v.
11 Am. Honda Motor Co., Inc., No. 2:12-cv-1142-SVW-PLA,
12 2013 WL 690822, at *9 (C.D. Cal. Feb. 19, 2013).
13 Accordingly, the Court **GRANTS** Defendant's Motion to
14 Dismiss.

15 2. Plaintiff failed to comply with Local Rule 7-3
16 in filing its Motion to Amend Complaint.

17 Local Rule 7-3 requires the parties to meet and
18 confer regarding the substance of a contemplated motion
19 and any potential resolution at least seven days prior
20 to filing the motion. L.R. 7-3.

21 Plaintiff fails to indicate whether and when the
22 parties met and conferred before it filed its Motion to
23 Amend Complaint. See Pl.'s Mot. For Leave 2:3-13. The
24 Court could, in its discretion, refuse to consider
25 Plaintiff's Motion for that reason. Reed v. Sandstone
26 Props., L.P., No. CV 12-05021 MMM (VBKx), 2013 WL
27 1322912, at *6 (C.D. Cal. Apr. 2, 2013). Nonetheless,
28 Defendant does not appear to have suffered any

1 prejudice from Plaintiff's failure to meet and confer,
2 and Defendant was able to prepare and submit an
3 opposition to Plaintiff's Motion. See Wilson-Condon v.
4 Allstate Indem. Co., No. CV 11-05538 GAF (PJWx), 2011
5 WL 3439272, at *1 (C.D. Cal. Aug. 4, 2011).

6 Although the Court considers the merits of
7 Plaintiff's Motion, failure to comply with Local Rule
8 7-3 in the filing of any future motions may result in
9 automatic dismissal of those motions.

10 3. The Court denies Plaintiff's Motion to Amend
11 Complaint because the Proposed FAC would be
12 futile.

13 a. *Breach of Contract Claim*

14 Under California law, a claim for breach of
15 contract must allege: (1) the existence of a contract
16 between Plaintiff and Defendant; (2) Plaintiff's
17 performance or excuse for nonperformance; (3)
18 Defendant's breach; and (4) resulting damages to
19 Plaintiff. Oasis West Realty, LLC v. Goldman, 250 P.3d
20 1115, 1121 (Cal. 2011). An assignee who has acquired
21 the right to receive the obligor's performance under
22 the contract may sue for breach of contract if the
23 obligor does not perform. Applera Corp. v. MP
24 Biomedicals, LLC, 93 Cal. Rptr. 3d 178, 193 (Cal. Ct.
25 App. 2009).

26 Plaintiff's Proposed FAC sufficiently alleges each
27
28

1 element of a claim for breach of contract.²

2 b. *Promissory Fraud Claim*

3 A claim for fraud requires proof of five elements:

4 (1) misrepresentation (false representation,
5 concealment, or nondisclosure); (2) knowledge of
6 falsity (or "scienter"); (3) intent to defraud (i.e.,
7 intent to induce reliance); (4) justifiable reliance;
8 and (5) damages. Bank of the West v. Valley Nat. Bank
9 of Ariz., 41 F.3d 471, 477 (9th Cir. 1994); Lazar v.
10 Super. Ct., 909 P.2d 981, 985 (Cal. 1996). "Promissory
11 fraud" is a subspecies of the action for fraud and
12 deceit. Lazar, 909 P.2d at 985. "A promise to do
13 something necessarily implies the intention to perform;
14 hence, where a promise is made without such intention,
15 there is an implied misrepresentation of fact that may
16 be actionable fraud." Id. Where a defendant
17 fraudulently induces the plaintiff to enter into a
18 contract, an action for promissory fraud may exist.

20 ² Plaintiff adequately asserts standing to sue for breach of
21 contract because Plaintiff alleges that the Tiger Bay Assignment
22 included the right to enforce the Personal Guaranty. See
23 Proposed FAC ¶¶ 16-20, 24-25; Tiger Bay Assignment ¶¶ B, 1.
24 Plaintiff also adequately alleges that the Personal Guaranty is
25 supported by consideration, and Defendant was not released from
26 his obligations under the Personal Guaranty by virtue of the Wang
27 Assignment because the Wang Assignment was made as additional
28 security for the QHF Loan, in addition to the Personal Guaranty.
See Proposed FAC ¶¶ 17, 21-22. Lastly, Defendant's argument that
his performance was excused is an affirmative defense, and
Plaintiff is not required to plead this defense in its Complaint.
See Fed. R. Civ. P. 8(c); see also Performance Chevrolet Inc. v.
Mkt. Scan Info. Sys., Inc., 298 F. App'x 573, 577 (9th Cir.
2009); Barnes v. AT & T Pension Ben. Plan-Nonbargained Program,
718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010).

1 Id. However, "something more than nonperformance is
2 required to prove the defendant's intent not to perform
3 his promise." Tanedo v. East Baton Rouge Parish Sch.
4 Bd., No. SA CV 10-0112 JAK, 2012 WL 5447959, at *7
5 (C.D. Cal. Oct. 4, 2012) (quoting Tenzer v. Superscope,
6 Inc., 702 P.2d 212, 219 (Cal. 1985)). A plaintiff in
7 an action for promissory fraud must produce evidence of
8 the promisor's intent to mislead him. Id. (citation
9 omitted).

10 Under Federal Rule of Civil Procedure 9(b), a party
11 alleging fraud must "state with particularity the
12 circumstances constituting fraud" even though
13 "[m]alice, intent, knowledge, and other conditions of a
14 person's mind may be alleged generally." Fed. R. Civ.
15 P. 9(b); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
16 317 F.3d 1097, 1106 (9th Cir. 2003). The circumstances
17 surrounding the alleged fraud must "be specific enough
18 to give [Defendant] notice of the particular misconduct
19 . . . so that [Defendant] can defend against the charge
20 and not just deny that [he has] done anything wrong."
21 Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir.
22 2009). "Averments of fraud must be accompanied by 'the
23 who, what, when, where, and how' of the misconduct
24 charged." Vess, 317 F.3d at 1106 (citation omitted);
25 see also UMG Recordings, Inc. v. Global Eagle Entm't,
26 Inc., 117 F. Supp. 3d 1092, 1106 (C.D. Cal. 2015).

27 / / /

28 / / /

i. *Plaintiff's Allegations of Promissory
Fraud*

Plaintiff alleges that "[o]n or about June 13, 2013, Defendants promised Plaintiff (as assignee of Wang) through the Personal Guaranty that they would repay the QHF Loan in the event it was not otherwise timely repaid." Proposed FAC ¶ 46. Plaintiff alleges that the "promise was made . . . with the intent to induce Plaintiff (through Wang) to . . . make [the QHF Loan]," and that "[i]n reliance on the promise of Defendants, Plaintiff (as assignee to Wang) provided the [QHF Loan] and agreed to extend the original deadline to repay the QHF Loan." *Id.* at ¶¶ 48, 50. Plaintiff alleges that it would not have taken such actions if it had known of Defendant's intention not to honor the Personal Guaranty. *Id.* at ¶ 50. Plaintiff also attaches and incorporates by reference the Personal Guaranty (Exhibit B), Wang Assignment (Exhibit C), and the Tiger Bay Assignment (Exhibit D). *See id.* at ¶ 24.

ii. *Assignment of a Tort Cause of Action
from Wang to Plaintiff*

Defendant asserts that "Plaintiff fails to establish how it, as an assignee, could have received and/or relied on any representations to Wang" and that "since Plaintiff is not in privity of contract with Defendant, it must allege facts sufficient to establish the essential tort element of duty." Def.'s Mot. 13:9-

12. The issue here is whether the Tiger Bay Assignment included Wang's right to assert a fraud claim against Defendant.

"An assignment agreement 'must describe the subject matter of the assignment with sufficient particularity to identify the rights assigned.'" Heritage Pac. Fin., LLC v. Monroy, 156 Cal. Rptr. 3d 26, 38 (Cal. Ct. App. 2013) (quoting Mission Valley E., Inc. v. Cnty. of Kern, 120 Cal. App. 3d 89, 97 (Cal. Ct. App. 1981)).

As with contracts generally, the nature of the assignment is determined by looking to the intent of the parties. Id. at 39 (citing Cambridge Co. v. City of Elsinore, 57 Cal. App. 245, 249 (Cal. Ct. App. 1922)). The assignment of a right, such as the right of a lender to assert a cause of action for fraud against a borrower, requires the assignor to manifest an intention to transfer "the right" to the assignee. See id. at 40. Although an assignment of a right generally carries with it an assignment of other rights incidental thereto, and incidental rights may include ancillary causes of action, the assignment agreement must particularly identify the rights assigned. Id. ("Fraud rights are not, as a matter of law, incidental to the transfer of [a promise to repay a debt to the lender].").

Here, the Tiger Bay Assignment which Plaintiff attaches and incorporates in its Proposed FAC, demonstrates that the assignment included Wang's tort

1 claim against Defendant.³ Because Wang's "remedies"
 2 "arising out of" the Personal Guaranty to secure the
 3 QHF Loan were assigned to Plaintiff, Plaintiff
 4 establishes that it has standing to assert a claim for
 5 promissory fraud against Defendant.

6 *iii. Defendant's Deceptive Intent*

7 Plaintiff alleges that "[a]t the time Defendants
 8 made the promise to Plaintiff, Defendants had no
 9 intention of performing it." Proposed FAC ¶ 47. These
 10 allegations do not adequately plead why Defendant's
 11 promise to repay the QHF Loan through the Personal
 12 Guaranty was false when made. See Smith v. Allstate
 13 Ins. Co., 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001)
 14 ("the plaintiff must plead facts explaining why the
 15 statement was false when it was made" (citation
 16 omitted)); UMG, 117 F. Supp. 3d at 1108 (plaintiff must
 17 plead facts from which it can be inferred that

19 ³ The Tiger Bay Assignment states that Wang assigned to
 20 Plaintiff:

21 All right, title and interest of Assignor [Wang] in and
 22 to the QHF Debt [QHF Loan] and Assigned Debt [Yihe
 23 Debt], and all rights of Assignor [Wang] to receive
 24 payment thereof, and **all rights, remedies, powers,**
 25 **privileges and authorities granted to or possessed by**
 26 **Assignor** [Wang] pursuant to the Initial Assignment
 27 [Wang Assignment] and **arising out of all agreements,**
 28 instruments and documents evidencing, **securing or**
supporting the QHF Debt [QHF Loan] and/or Yihe's
 indebtedness and other obligations thereunder or by
 operation of law, in respect of the Assigned Debt [Yihe
 Debt], including, without limitation, the unrestricted
 right to enforce, collect, settle and compromise the
 QHF and Assigned Debt [QHF Loan and Yihe Debt].

Proposed FAC, Ex. D ¶ B (emphasis added).

1 defendant had no intention of performing at the time
2 the promise was made).

3 Mere nonperformance of a promise does not suffice
4 to show the falsity of the promise. Id.; see also
5 Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30 (Cal.
6 1985) ("something more than nonperformance is required
7 to prove the defendant's intent not to perform his
8 promise" (citation omitted)). Although intent can be
9 averred generally under Rule 9(b), Plaintiff does not
10 point to facts which show more than Defendant's
11 nonperformance, and that Defendant harbored an
12 intention not to be bound by the terms of the Personal
13 Guaranty at formation.

14 Thus, Plaintiff fails to plead fraud with the
15 specificity required by Rule 9(b), and Plaintiff's
16 allegations of promissory fraud contained in the
17 Proposed FAC would be futile. See Tanedo v. E. Baton
18 Rouge Parish Sch. Bd., No. SA CV 10-01172 JAK, 2012 WL
19 5447959, at * 9 (C.D. Cal. Oct. 4, 2012) (allegations
20 that counter-defendant "never intended to pay" and made
21 promises "with the intent to deceive [counter-claimant]
22 and induce it into relying" were insufficient to plead
23 deceptive intent); Mat Van, Inc. v. Sheldon Good & Co.
24 Auctions, LLC, No. 07-CV-912 IEG BLM, 2007 WL. 2206946,
25 at *6 (S.D. Cal. July 27, 2007) (allegations that
26 defendant ultimately did not perform the material terms
27 of the contract were insufficient); Hsu v. OZ Optics
28 Ltd., 211 F.R.D. 615, 620 (N.D. Cal. 2002) (allegations

1 that "defendant OZ had no intention to be bound by the
2 terms as agreed in the aforesaid agreements" were
3 insufficient).

4 c. *Avoidance of Fraudulent Conveyance Claim*

5 California Civil Code § 3439.05 provides:

6 A transfer made or obligation incurred by a
7 debtor is voidable as to a creditor whose claim
8 arose before the transfer was made or the
9 obligation was incurred if the debtor made the
10 transfer or incurred the obligation without
11 receiving a reasonably equivalent value in
12 exchange for the transfer or obligation and the
13 debtor was insolvent at that time or the debtor
14 became insolvent as a result of the transfer or
15 obligation.

16 Cal. Civ. Code § 3439.05(a).

17 To set aside a transfer under California Civil Code
18 § 3439.05, Plaintiff must show: (1) Plaintiff was a
19 creditor of Yihe at the time of the allegedly
20 fraudulent transfer; (2) the conveyance was made or the
21 obligation entered when Yihe was insolvent or thereby
22 rendered insolvent as a result of the transfer
23 obligation; and (3) the conveyance was made or the
24 obligation entered into without reasonably equivalent
25 value. See Annod Corp v. Hamilton & Samuels, 100 Cal.
26 App. 4th 1286, 1294-95 (Cal. Ct. App. 2002).

27 To support its claim for avoidance of fraudulent
28 transfer, Plaintiff's Proposed FAC alleges that "Yihe

1 transferred funds to Defendant without receiving a
2 reasonably equivalent value in exchange for the
3 transfers," and "Plaintiff's right to payment from Yihe
4 arose before it transferred the funds to Defendants."
5 Proposed FAC ¶ 55. Plaintiff alleges that Yihe was
6 insolvent or became insolvent after the transfer of
7 funds to Defendants. Id. at ¶ 56. Plaintiff attaches
8 the Receivership Report of James Wong ("Wong") to
9 support its allegation that Yihe's debts were greater
10 than the total amount of Yihe's assets. Id. at ¶¶ 27-
11 31, 56; Ex. E, Wong Report, ECF No. 26-1. The Wong
12 Report addresses Yihe's operational issues, accounting
13 irregularities, and Defendant's mismanagement of Yihe.
14 See generally Wong Report.

15 Plaintiff also alleges that in 2013, Wong brought
16 an action as Yihe's Receiver against a corporation
17 named Yijia to set aside an allegedly fraudulent
18 transfer, based in part on allegations that "Yihe was
19 insolvent as defined in California Civil Code [] §
20 3439.02." Proposed FAC ¶ 31; see also Compl. ¶¶ 26,
21 30, 35, 43, 47, Wong v. Qingdao Yijia Native Import &
22 Export, Ltd., No. 13-cv-7207 (C.D. Cal., filed Sep. 30,
23 2013).

24 Plaintiff alleges that on or about January 27,
25 2015, Plaintiff conducted an examination of Defendant
26 in which Defendant testified that despite Yihe's
27 insolvency during this time period, Defendant caused
28 Yihe to pay him approximately \$480,000 per year for the

1 years 2013 through 2015. Proposed FAC ¶ 37. Plaintiff
2 alleges that Defendant caused Yihe to make "other
3 payments" and transfer funds to him to the detriment of
4 Yihe's creditors, including Plaintiff. Id. As a
5 result of the allegedly fraudulent transfers, Plaintiff
6 alleges that it has been damaged in the amount of
7 \$3,696,101.03, plus interest. Id. at ¶ 52.

8 Plaintiff's allegations are sufficient to plead the
9 second element for avoidance of fraudulent conveyance,
10 that Yihe was insolvent or was rendered insolvent when
11 it made the transfers to Defendant. However, the
12 remaining allegations fail to satisfy even the
13 requirements of Federal Rule of Civil Procedure 8,
14 although the allegations of actual fraud are subject to
15 Rule 9's heightened pleading standard.

16 Plaintiff does not allege what, if anything,
17 Defendant offered in exchange for the allegedly
18 fraudulent payments from Yihe. Thus, Plaintiff does
19 not adequately allege that the transfers were made
20 without reasonably equivalent value.

21 Moreover, Plaintiff does not demonstrate that it
22 was Yihe's creditor when Yihe paid Defendant's salary
23 in 2013 through 2015. Plaintiff also does not allege
24 when the "other payments" constituting fraudulent
25 transfers were made, or that Plaintiff was Yihe's
26 creditor at that time.

27 These allegations are the type of "label and
28 conclusion" that cannot withstand a motion to dismiss

1 for failure to state a claim. Twombly, 550 U.S. at
2 555. Accordingly, the allegations in the Proposed FAC
3 fail to state a claim for avoidance of fraudulent
4 conveyance pursuant to California Civil Code § 3439.05,
5 and the Proposed FAC is futile in this regard.

6 d. *Accounting Claim*

7 Plaintiff's fourth claim seeks an accounting
8 pursuant to California Civil Code § 3439.07(a)(1).
9 Proposed FAC ¶¶ 60-62. Plaintiff alleges that since
10 January 2013, "Defendant received from Yihe's lenders,
11 vendors and customers, payments amounting of more than
12 \$1,000,000." Proposed FAC ¶ 61. Plaintiff's claim for
13 accounting demands that Defendant account to Plaintiff
14 for any and all sums received by Defendant. Id. at ¶
15 62.

16 To bring a claim for accounting, Plaintiff must
17 show (1) that a relationship exists between Plaintiff
18 and Defendant that requires an accounting; and (2) that
19 some balance is due to Plaintiff that can only be
20 ascertained by an accounting. Haddock v. Countrywide
21 Bank, NA, No. CV 14-6452 PSG (FFMx), 2015 WL 9257316,
22 at *12 (C.D. Cal. Oct. 27, 2015); Teselle v.
23 McLoughlin, 127 Cal. App. 4th 156, 179 (Cal. Ct. App.
24 2009). An action for accounting is not available where
25 the plaintiff alleges the right to recover a sum
26 certain or a sum that can be made certain by
27 calculation. Teselle, 173 Cal. App. 4th at 179.
28 Because Plaintiff asserts that it is entitled to

1 receive a sum of \$3,696,101.03, Plaintiff fails to
2 establish that an action for accounting is available.
3 Accordingly, Plaintiff's proposed claim for accounting
4 is futile. Because the claim cannot be cured by
5 amendment, the Court **DISMISSES** Plaintiff's claim for
6 accounting **WITH PREJUDICE**.

7 **III. CONCLUSION**

8 Because Plaintiff's Proposed FAC fails to allege
9 viable claims for promissory fraud, fraudulent
10 conveyance, and accounting, the Court **DENIES**
11 Plaintiff's Motion for Leave to File the Proposed FAC
12 [26]. However, given Plaintiff's failure to file an
13 Opposition to Defendant's Motion to Dismiss, the Court
14 **GRANTS** Defendant's Motion to Dismiss [15].

15 This is the first time this Court has assessed the
16 sufficiency of Plaintiff's Complaint. The Proposed FAC
17 adequately pleads a claim for breach of contract, and
18 Plaintiff may be able to plead plausible claims for
19 promissory fraud and avoidance of fraudulent
20 conveyance.⁴

21
22 ⁴ The other Foman factors do not weigh in favor of denial of
23 leave to amend the second and third causes of action.
24 Defendant's arguments that "Plaintiff . . . lured Defendant into
25 changing his position [in settlement negotiations] with a promise
26 of a resolution that was later withdrawn," and that Plaintiff is
27 now pursuing an action against him "only as a means to put
28 indirect pressure on the corporation [Yihe] and gain advantage in
the other lawsuit," are unsupported by any specific facts,
evidence or a sworn declaration. See Def.'s Opp'n 5:17-26.
These arguments do not support a finding of undue prejudice.
Moreover, discovery has not yet begun, the Court has not held a
scheduling conference, and no trial date or pretrial conference
has been set. Accordingly, it does not appear that Defendant is

1 Accordingly, the Court **DISMISSES** Plaintiff's
2 Complaint **WITH TWENTY DAYS LEAVE TO AMEND** so that
3 Plaintiff may cure the deficiencies in its second and
4 third causes of action in the Proposed FAC.
5 Plaintiff's fourth cause of action for accounting,
6 however, cannot be cured by amendment, and is **DISMISSED**
7 **WITH PREJUDICE.**
8 **IT IS SO ORDERED.**

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10 DATED: May 5, 2016

s/ RONALD S.W. LEW

11 **HONORABLE RONALD S.W. LEW**
12 Senior U.S. District Judge
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26 unduly prejudiced by the timing of Plaintiff's request to amend
27 the Complaint. See ABM, 237 F.R.D. at 227-28. Lastly, Defendant
28 does not show that Plaintiff acted in bad faith or engaged in
dilatory tactics in seeking to amend the Complaint because
Plaintiff's delay in seeking amendment can be explained by the
parties' attempt to settle this action.